



University of Kentucky
UKnowledge

1970-1979

Briefs

1-23-1976

Ronald L. Coy v. Kenny Hardin and Buckeye Union Insurance Company, Ronald L. Coy v. Tommy Hardin and Buckeye Union Insurance Company

Appellant's Brief 1975-SC-1161

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s



Part of the [Courts Commons](#)

Repository Citation

1975-SC-1161, Appellant's Brief, "Ronald L. Coy v. Kenny Hardin and Buckeye Union Insurance Company, Ronald L. Coy v. Tommy Hardin and Buckeye Union Insurance Company" (1976). 1970-1979. 378.

https://uknowledge.uky.edu/ky_appeals_briefs70s/378

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1975-SC-1161-01

{F1FF7B21-74AD-4975-9F6B-B3DA170C5D05}

{135147}{54-130809:112520}{012376}

APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

RONALD L. COY - - - - - Appellant
versus File No. 75-1161

KENNY HARDIN &
 BUCKEYE UNION INSURANCE COMPANY - Appellees

RONALD L. COY - - - - - Appellant
versus File No. 75-1159

TOMMY HARDIN &
 BUCKEYE UNION INSURANCE COMPANY - Appellees

Appeal from Bullitt Circuit Court

FILED **BRIEF FOR APPELLANT**

JAN 23 1976

MARTHA LAYNE COLLINS
 CLERK
 SUPREME COURT

GENE R. OSSELMEIER, ESQ.
 204 Walnut Street
 Shepherdsville, Kentucky 40165
Attorney for Appellant

This is to certify that copies of this brief have been served on J. D. Buckman, Jr., Esq., Third & Buckman Streets, Shepherdsville, Kentucky, 40165, Norman R. Lemme, Esq., Second Street, Shepherdsville, Kentucky, 40165, and, Honorable C. V. Sanders, Trial Judge, Shepherdsville, Kentucky, 40165, pursuant to RCA 1.250.

Gene R. Osselmeier, Esq.
Attorney for Appellant

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
STATEMENT OF QUESTIONS PRESENTED.....	iii
STATEMENT OF THE CASE.....	1- 2
STATEMENT OF FACTS.....	2- 3
ARGUMENT	4-12
Argument on Question 1.....	3- 5
Argument on Question 2.....	6- 7
Argument on Question 3.....	7- 8
Argument on Question 4.....	8- 9
Argument on Question 5.....	10-12
Cases and Authorities:	
K.R.S. 95.750	1, 6-7
K.R.S. 413.140	1-2, 4-5, 6, 7, 8
K.R.S. 413.120(2)	5, 6, 7
K.R.S. 413.120(7)	5, 7, 8
K.R.S. 413.040	5
K.R.S. 413.090 (2) (3)	8- 9
K.R.S. 413.110	9
K.R.S. 413.200	9
K.R.S. 413.210	9
K.R.S. 413.220	9
K.R.S. 413.230	9
K.R.S. 413.240	9
<i>Hill v. Ragland</i> , 114 Ky. 209, 70 S. W. 634.....	10, 10-12
<i>National Surety Co. of New York v. Hester's Adm'r</i> , 211 Ky. 623, 44 S. W. 2d 563.....	10, 12

	PAGE
<i>Forsythe v. Ellis</i> , 4 J.J. Marsh. 298, 20 Am. Dec. 218.	10, 11
<i>Commonwealth v. Stockton</i> , 5 T.B. Mon. 192.	10
<i>Jewel v. Mills</i> , 3 Bush, 64.	10
<i>Hargis v. Sewell's Adm'r</i> , 87 Ky. 69, 7 S. W. 557.	11-12

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court err in granting the defendant's Motion to Dismiss?
2. Did the Court err in failing to apply K.R.S. 413.120(2), to the facts in this case?
3. Did the Court err in failing to apply K.R.S. 413.120(7), to the facts in this case?
4. Did the Court err in failing to apply K.R.S. 413.090(2) and (3), to the facts in this case?
5. Did the Court err in not following the cases of *Hill v. Ragland*, and *National Surety Co. of New York v. Hester's Administrators*?

SUPREME COURT OF KENTUCKY

RONALD D. COY - - - - - *Appellant*

v. File No. 75-1161

KENNY HARDIN &

BUCKEYE UNION INSURANCE COMPANY - *Appellees*

RONALD L. COY - - - - - *Appellant*

v. File No. 75-1159

TOMMY HARDIN &

BUCKEYE UNION INSURANCE COMPANY - *Appellees*

APPEAL FROM BULLITT CIRCUIT COURT

BRIEF FOR APPELLANT

May it please the Court:

STATEMENT OF THE CASE

Plaintiff filed a Complaint for Damages against the Defendants (Police Officers and their sureties), for relief under the provisions of K.R.S. 95.750. The Defendants filed Motions to Dismiss and Answers. Amended motions to Dismiss were filed, with leave of Court, to set up affirmatively the defense of Statute of Limitations. The Trial Court held that the provisions of K.R.S. 413.140 applied and entered an Order and

Judgment accordingly, which is styled "Order on Motion to Dismiss", and may be found on Pages 12-13, of the Record on Appeal, Case No. 4435, and Pages 8-10, of the Record on Appeal, Case No. 4526. The sole question presented to the Court of Appeals is: "Which Statute of Limitation applies?"

The brief in this cause is consolidated for the Case No. 4435, styled Coy v. Tommy Hardin and Buckeye Union Insurance Company, and, Case No. 4526, styled Coy v. Kenny Hardin and Buckeye Union Insurance Company, it being a situation of companion cases, stating the same cause of action, with the incident arising at the same time and arising out of the same incident.

STATEMENT OF FACTS

On or about the 10th day of October, A.D., 1973, at or near Blue Lick Road, in the City of Shepherdsville, County of Bullitt, Commonwealth of Kentucky, the Plaintiff, while being arrested, received a cruel beating from the Defendants, Thomas Hardin and Kenny Hardin, who, at that time and place, were police officers of the City of Shepherdsville. As a result of the beating, the Plaintiff received injuries described as:

- laceration on back of head;
- laceration on forehead;
- bruised kidney;
- strained and sprained knee;
- strained and sprained ankle; and,

numerous other bruises and contusions about his body. The Defendants, as police officers, did make and file

bonds under the provisions of K.R.S. 95.750. The complaint filed in this case was, as alleged in the first paragraph thereof:

“That this is a complaint brought under the provisions of K.R.S. 95.750, for any unlawful arrest, or unnecessary or cruel treating or assault in making an arrest. . . .”

ARGUMENT

Argument on Question 1: Did the Court Err in Granting the Defendant's Motion to Dismiss?

The Order referred to in this argument may be found on pages 12-13 of the Record on Appeal, Case No. 4435, and, Pages 8-10 of the Record on Appeal, Case No. 4526.

The Order, ommitting the formal parts, is as follows:

ORDER ON MOTION TO DISMISS (Case No. 4435)

“This cause coming on to be heard on the 19th day of September, 1975, on the Motion to Dismiss, heretofore filed by the Defendant, Tommy Hardin, and the Motion to Dismiss heretofore filed by Buckeye Union Insurance Company; the Plaintiff being represented by Gene R. Osselmeier, Esq.; the Defendant, Tommy Hardin, being represented by J. D. Buckman, Jr., Esq.; and the Defendant, Buckeye Union Insurance Company being represented by Norman R. Lemme, Esq.; and the Court having heard argument presented by all parties concerning the application of Statute of Limitations and the Court having heard argument presented by all parties, and the Court being otherwise fully advised in the premises, finds:

1. That the Statute of Limitations, requiring this action to be brought within one year, being K.R.S. 413.140, is controlling.

2. The Court further finds that this cause should be dismissed.

3. The Court further finding that the Plaintiff has chosen not to plead further; it is therefore,

ORDERED AND ADJUDGED that the Motions to Dismiss, hereinabove referred to, be and the same are hereby granted, and this cause be dismissed.

Done and ordered at Shepherdsville, Kentucky, this 10th day of October, A.D., 1975.

/s/ C. V. Sanders
Circuit Judge"

(NOTE: The same order was filed in the case of Coy v. Kenny Hardin & Buckeye Union Insurance Company, being Case #4526, Bullitt Circuit Court.)

The statute referred to in the Court's Order, being K.R.S. 413.140, is as follows:

"413.140. Actions to be brought within one year. —(1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice or servant.

(b) An action for injuries to persons, cattle or other livestock by railroads or other corporations.

(c) An action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation or breach of promise of marriage.

(d) An action for libel or slander.

(e) An action against a physician or surgeon for negligence or malpractice.

(f) An action for the escape of a prisoner, arrested or imprisoned on civil process.

(g) An action for the recovery of usury paid for the loan or forbearance of money or other thing, against the loaner or forbearer or assignee of either.

(h) An action for the recovery of stolen property, by the owner thereof against any person having the same in his possession.

(i) An action for the recovery of damages or the value of stolen property, against the thief or any accessory.

(2) In respect to the action referred to in paragraph (g) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time of payment. This limitation shall apply to all payments made on all demands, whether evidenced by writing or existing only in parol.

(3) In respect to the action referred to in paragraph (h) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time the property is found by its owner.

(4) In respect to the action referred to in paragraph (i) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time of discovery of the liability. (2516, 2517, 2553.)''

The plaintiff contends that the Trial Court erroneously applied, to the facts in this case, K.R.S. 413.140; that, the Court should have applied K.R.S. 413.120(2), or 413.120(7) or, K.R.S. 413.040.

Argument on Question 2: Did the Court Err in Failing to Apply K.R.S. 413.120(2), to the Facts in This Case?

The Trial Court, as may be seen from the order appearing on Pages 12-13, of the Record on Appeal, Case No. 4435, and, Pages 8-10 of the Record on Appeal, Case No. 4526, applied K.R.S. 413.140.

The pertinent part of K.R.S. 413.120 is as follows:

“(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.”

The Complaint filed by Plaintiff, Appellant, may be found on Pages 2-5, of the Record on Appeal, Case No. 4435, and, Pages 2-4 of the Record on Appeal, Case No. 4526, and, paragraph 1 thereof, is as follows:

“1. That this is a complaint brought under the provisions of K.R.S. 95.750, for any unlawful arrest or unnecessary or cruel treating or assault in making an arrest”

The entire provisions of K.R.S. 95.750, are as follows:

“95.750. Bond of chief of police, deputies, policemen.—(1) In cities of the fourth class the chief of police, his deputies, and every member of the police force shall, before entering upon the duties of his office, execute bond. The bonds of the chief of police and his deputies shall be in the sum of \$2,500.00, and the bond of each member of the police force shall be in the sum of \$1,000.

(2) In cities of the fifth class the chief of police and each member of the police force, before

entering upon the duties of his office, shall execute bond. The bond of the chief of police shall be in the sum of \$2,000, and the bond of each member of the police force in the sum of \$1,000.

(3) These bonds in cities of the fourth and fifth classes shall run to the state, and shall be with good surety, approved by the city legislative body, except that in cities of the fourth class the bonds of the members of the police force shall be approved by the mayor. The bonds shall be conditioned for the faithful discharge of the duties of the office and for payment of all money received to the person entitled thereto. *For any unlawful arrest, or unnecessary or cruel treating or assault in making an arrest, the principal and sureties shall be liable on their bond to the person injured.*" (Italics added.)

As can be seen by reading the statute, this is a liability created by K.R.S. 95.750, and said statute fixes no other time for limitations of actions.

The limitation period in K.R.S. 413.120(2), is five (5) years.

Argument on Question 3: Did the Court Err in Failing to Apply K.R.S. 413.120(7), to the Facts in This Case?

The Trial Court, as may be seen from the Order appearing on Pages 12-13, of the Record on Appeal, Case No. 4435, and, Pages 8-10 of the Record on Appeal, Case No. 4526, applied K.R.S. 413.140.

The pertinent part of K.R.S. 413.120(7) is as follows:

"(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated."

The complaint, filed by Plaintiff, found on Pages 2-5, of the Record on Appeal, Case No. 4435, and, Pages 2-4 of the Record on Appeal, Case No. 4526, indicates that this is an action brought under the provisions of K.R.S. 95.750; the entire provisions of the statute can be found under Argument on Question 2.

The Complaint does show that it is an action for an injury to the rights of the Plaintiff, in that he was injured in the course of the Defendants making an arrest and is not an incident arising on a contract; and, the statute, giving rise to the cause of action, does not set forth a limitation period.

The limitation period in K.R.S. 413.120(7) is five years.

Argument on Question 4: Did the Court Err in Failing to Apply K.R.S. 413.090 (2) and (3), to the Facts in This Case?

As previously noted, the Trial Court applied to the facts in this case, K.R.S. 413.140, which Order may be found on Pages 12-13, of the Record on Appeal, Case No. 4435, and, Pages 8-10 of the Record on Appeal, Case No. 4526.

The pertinent part of K.R.S. 413.090 is as follows:

“Action upon judgment, written contract or bond—15 year limitation.—Except as provided in K.R.S. 413.110, 413.200, 413.210, 413.220, 413.230 and 413.240, the following actions shall be commenced within fifteen (15) years after the cause of action first accrued: . . .

(2) An action upon a recognizance, bond or written contract.

(3) An action upon the official bond of a sheriff, marshal, clerk, constable, or other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law.”

The complaint filed by the Plaintiff was on a bond, the surety having been joined as a party defendant, and the complaint was brought under the provisions of K.R.S. 95.750.

K.R.S. 413.110, applies to an action against a county on a bonded obligation or an action on a state warrant, which statute would not be applicable to the issue at hand.

K.R.S. 413.200, applies to “action against personal representative who has settled accounts.”

K.R.S. 413.210, applies to “action against heirs and personal representative when estate divided.”

K.R.S. 413.220, appears, by virtue of the holdings of this Court, to apply as a limitation in a situation for obligations other than those kinds of actions as Plaintiffs are complaining of in this suit.

K.R.S. 413.230, it is suggested, does not apply to the facts at hand, because it pertains to:

“A surety for an executor, administrator, guardian or curator, or for a sheriff to whom a decedent’s estate has been transferred”

By the provisions of K.R.S. 413.240, it applies to K.R.S. 413.220 and K.R.S. 413.230.

Argument on Question 5: Did the Court Err in Not Following the Cases of *Hill v. Ragland*, and *National Surety Co. of New York v. Hester's Administrators*?

The cases and the citation thereof, referred to in this statement of the question, are as follows:

Hill v. Ragland, 114 Ky. 209, 70 S. W. 634;

National Surety Co. of New York v. Hester's Administrators, 241 Ky. 623, 44 S. W. 2d 563.

The holding of *Hill v. Ragland* is that the Statute of Limitations applicable is fifteen (15) years.

Appellant quotes from the Opinion, beginning on page 636, as follows:

"1. . . . That the official bond of the sheriff covers his tortious act in levying a writ upon the property of a stranger to the suit, and entitles the owner to recover his damages against the official's bondsmen, is no longer an open question. *Forsythe v. Ellis*, 4 J.J. Marsh. 298, 20 Am. Dec. 218; *Com. v. Stockton*, 5 T.B. Mon. 192; *Jewell v. Mills*, 3 Bush, 64. In that state of case the action is upon the bond; the breach being the wrongful seizure of the stranger's goods under process, which made the act an official one, instead of a personal trespass. The act of making the wrongful seizure was a breach of the covenant of the bond 'to well and faithfully perform the duties of his office,' and gave a right of action that instant against the sheriff and his sureties.

2. . . . But as against the sheriff, section 2514, Ky. St. applies, allowing 15 years within which to commence the action 'upon the official bond of the sheriff.' We consequently construe that the five-

year statute (section 2515, Ky. St.), applicable ordinarily to torts, does not apply to this case. Notable stress in argument is laid upon the idea that the averments of this petition are so defective as to make the complaint one against the sheriff, and not a suit upon his official bond. We cannot conceive how an action against a sheriff for a wrongful act done by him under color and by virtue of his office, acting under a writ which by law he was permitted and authorized to execute, can be other than a breach of his bond. He acts only in virtue of the authority given him by law, and then only because of, and always under, his official bond. The very purpose of requiring it was to protect the public against the officer's wrongful acts as such, whether of omission or commission. In *Forsythe v. Ellis*, 4 J. J. Marsh, 302, 20 Am. Dec. 218, it was said: 'The official bond should bind the sheriff no further than he would be liable without it. Its only object is to secure the faithful performance of official duty. And therefore no official act can be considered a breach of the condition of the bond, faithfully to execute the duties of the office, unless it would, without a bond, amount to a breach of official duty.' The converse must be equally true. In *Hargis v. Sewell's Adm'r*, 87 Ky. 69, 7 S. W. 557—an action against an administrator for failure to discharge a duty imposed by his office—the question was raised whether the statute fixing limitation of an action on his bond (section 2524, supra) applied, or whether the administrator was bound as a trustee of an express trust. In disposing of that question, this court said: 'If he is not liable upon his written obligation to pay this money and discharge faithfully his duties as administrator (by his bond), we cannot well see in what manner a personal liability can arise by reason of an implied

undertaking to discharge similar duties. The bond is required to be executed with surety for the faithful performance of the trust, and on this bond the appellants must proceed, with the limitation of fifteen years applying to the principal obligor.' We think the reasoning of that opinion applies as truly here."

If the fifteen (15) year limitation applies to the sheriff's tortious acts, it would apply to the tortious acts of a police officer, who has filed and made an official bond. Therefore, Appellant urges that limitation period applicable to the case at hand, is fifteen (15) years.

The holding of *National Surety Co. of New York v. Hester's Adm'r*, indicates that the Statute of Limitations is seven (7) years, on the action on a policeman's bond, for a tort, namely negligence. The statements of the court may be found on page 565, of the Opinion, as follows:

"On April 23, 1927, some one had violated the law in Hunt's presence, and he in this county automobile was pursuing this violator in an effort to arrest him. Ray Hester, a little 8 or 9 year old boy, ran across the street in pursuit of a ball with which he had been playing; he ran into the left side of the automobile Hunt was driving, was struck by the handle on the left door, and was killed instantly."

CONCLUSION

Considering the misapplication of the Statutes of Limitation, as they pertain to this cause, Appellant believes the Judgment should be reversed.

Respectfully submitted,

GENE R. OSSELMEIER, Esq.
P.O. Box 577—204 Walnut Street
Shepherdsville, Kentucky 40165

Attorney for Appellant